

FREQUENTLY ASKED QUESTIONS REGARDING THE NEW PUBLIC CONSTRUCTION REFORM LAW*

Chapter 193 of the Acts of 2004, entitled "*An Act Further Regulating Public Construction In the Commonwealth*" was signed into law on July 19, 2004. Chapter 193 changed public construction statutes, thresholds, and procedures to be followed for public construction projects. Highlights of the new law include: new higher thresholds for general and filed sub-bidders; DCAM certification requirements for filed sub-bidders; prequalification requirements for both general bidders and filed sub-bidders on certain public building projects; an owner's project manager requirement for certain projects; an MBE/WBE program requirement for state funded municipal projects; and a new statute, M.G.L. c. 149A, created to permit the use of the construction manager at risk alternative delivery method on larger public building construction projects. In addition, the new law permits the use of the design build construction delivery method for larger public works projects.

****PLEASE BE ADVISED THAT THE INFORMATION PROVIDED ON THIS WEBSITE WILL BE UPDATED REGULARLY. THEREFORE, PLEASE BE SURE TO CHECK THIS WEBSITE FREQUENTLY AND CONSULT WITH YOUR LEGAL COUNSEL FOR ADDITIONAL INFORMATION.***

ALTERNATIVE DELIVERY METHODS CONSTRUCTION MANAGER AT RISK AND DESIGN BUILD

1. What is the Construction Management at Risk (CM at Risk) delivery method?

ANSWER: CM at Risk is an alternative to the traditional design-bid-build method of building as embodied in Chapter 149. A new statute, M.G.L. c. 149A, was created by Chapter 193 of the Acts of 2004 that provides the option to cities and towns (as well as public agencies) to use the CM at Risk method for building projects valued at \$5 million or more. Under CM at Risk, a public owner prequalifies and selects a Construction Manager (CM) during the design phase. The CM provides planning, estimating, scheduling and other consulting services to the Owner and Architect during the design phase. When the design is near completion, the CM and the awarding authority negotiate a Guaranteed Maximum Price ("GMP") and schedule. The CM then acts as the general contractor during the construction of the project and prequalifies and procures all of the construction trade contractors that will perform the work. The CM is required to share all cost information with the public owner so that an informed public owner will only pay for the Cost of the Work plus an agreed fee for the CM up to the GMP.

To use CM at Risk non-exempt public agencies must receive prior approval from the Office of the Inspector General and demonstrate that:

- an authorization from the appropriate governing body has occurred;
- the public agency has the capacity, a plan and procedures to procure and manage the CM at Risk services and has retained the services of a qualified owner's project manager;
- the public agency has procedures to ensure fairness in competition, evaluation, and reporting in every stage of the procurement process; and
- the project has an estimated construction value of \$5 million or more.

The Office of the Inspector General is in the process of promulgating regulations and procedures to implement the CM at Risk process. You should regularly check the IG website at <http://www.mass.gov/ig/> for updated information on the status of the CM at Risk regulations, procedures, and the implementation schedule. The exempt agencies are DCAM, the Massachusetts Port Authority, the Massachusetts Water Resource Authority, the Massachusetts State Colleges Building Authority, and the University of Massachusetts Building Authority.

2. May our city or town use the CM at Risk delivery method to construct our new school?

ANSWER: The Legislature has approved the CM at Risk delivery method for use on public building projects starting on January 1, 2005. To opt to use this delivery method the project must be estimated to cost \$5 million or more and the awarding authority must receive prior approval from the Office of the Inspector General. In connection with its efforts to promulgate regulations and procedures to implement the CM at Risk process, the Office of Inspector General is developing an *"Application to Proceed"* form for completion by awarding authorities seeking to use the CM at Risk delivery method. You should regularly check the Office of the Inspector General's website at <http://www.mass.gov/ig/> for updated information on the status of the CM at Risk regulations, procedures, *Application to Proceed*, and the implementation schedule.

3. **I have heard that there is an application process for awarding authorities to use the CM at Risk and Design Build delivery methods. What agency do we apply to?**

ANSWER: The new law requires an awarding authority seeking to use either CM at Risk or Design Build to submit an *Application to Proceed* to the Office of the Inspector General providing detailed information about the project and the awarding authority's plans and procedures for managing the project. If the awarding authority meets specific requirements, the Office of the Inspector General will issue a Notice to Proceed with the procurement. The Office of the Inspector General is in the process of promulgating regulations and procedures to implement the CM at Risk and Design Build processes. You should regularly check the Office of the Inspector General's website at <http://www.mass.gov/ig/> for updated information on the status of the CM at Risk and Design Build regulations, guidelines, and the implementation schedule.

4. Will the team assembled by our town be required by the application process to demonstrate expertise in the use of the CM at Risk delivery method?

ANSWER: Yes. In the application submitted to the Inspector General's Office, you should be prepared to demonstrate at a minimum that your CM at Risk team:

- understands specific aspects of a two-phased qualifications-based procurement for a construction management at risk firm as outlined in the Act;
- has experience interpreting specific contract terms and requirements;
- understands the specific preconstruction or design phase tasks expected of the CM at Risk firm;
- has a plan for how the municipality will manage the GMP process;
- understands the concept of "open book" cost monitoring and has a policy on auditing project costs at project completion;
- has a plan for managing the monthly and final project requisition process;
- has a complete trade and "other subcontractor" procurement plan that will promote maximum qualified competition while assuring CM at Risk accountability for trade contractor work.

5. **What are some of the benefits of my city using a CM at Risk delivery method?**

ANSWER: Under CM at risk, a public agency may benefit by:

- The ability to prequalify and select your Construction Manager ("CM") on the basis of its reputation and record in controlling costs, meeting deadlines, and satisfying customers.
- The participation of the CM in design and phasing decisions so that "unbuildable" or costly design details or phasing plans may be avoided and design/drawing inconsistencies may be limited.
- The CM's ownership of the construction budget through early cost estimating leading to a Guaranteed Maximum Price ("GMP") for the work.
- The ability to "fast track" the start of construction by bidding early trade contracts which the CM will ultimately incorporate into the final GMP.
- The right and responsibility to monitor and audit the construction costs of the project to ensure the city pays only the costs of the work plus the agreed fee to the CM.
- A spirit of cooperation between the owner, architect, CM and trade contractors due to a defined allocation of project responsibilities and the CM's interest in obtaining strong references for future work.

6. Must our city or town wait until January 1, 2005 to prepare to use CM at Risk to construct our new library?

ANSWER: No. There are numerous steps that your town can take to assemble a qualified team to prepare for use of CM at Risk in advance of the January 1, 2005 implementation date. For example, you may:

- Conduct a solicitation for a qualified owner's project manager.
- Conduct a procurement process as outlined in Chapter 149A for a qualified designer.
- Establish a Prequalification Committee as outlined in Chapter 149A.

7. What are some of the similarities and differences between the CM at Risk delivery method versus the traditional design-bid-build method?

ANSWER: The primary similarities and differences between CM at Risk and design-bid-build are as follows:

- CM at Risk and design-bid-build require similar designer selection processes, however, the CM at Risk firm should be chosen early in the design process, unlike the design-bid-build method. This allows an opportunity for the CM to provide pre-construction services that may be beneficial to the awarding authority, such as early cost estimates, project planning and scheduling, value engineering and constructability studies, developing construction phasing strategies, determining filed sub-bid scopes of work, and assisting in prequalifying filed sub-bidders.
- Both the CM at Risk method and the design-bid-build method require an owner's project manager for projects with estimated construction costs of \$1.5 million or more.
- Both the CM at Risk alternative and the traditional design-bid-build method require the use of the new *Prequalification* process. For design-bid-build projects, prequalification is required where the estimated construction costs are \$10 million or more and optional, at the discretion of the awarding authority, where the estimated construction costs are less than \$10 million, but not less than \$100,000. By contrast, prequalification is mandatory on all CM at Risk projects, regardless of the size (i.e. not just projects with estimated costs of \$10 million or more). The prequalification process for CM at Risk, however, requires the submission of separate technical and price components from qualified firms and permits consideration of non-price components in the selection of a construction manager.
- Both methods require a filed sub-bid process. For design-bid-build projects, prequalification of sub-bidders is required where the estimated construction costs are \$10 million or more and optional at the discretion of the awarding authority where the estimated construction costs are less than \$10 million but not less than \$100,000. Under the design-bid-build method usually the contractor selects a sub-bidder from a list of filed sub-bidders developed by the awarding authority. In the context of CM at Risk, filed sub-bid category subcontractors are referred to as "Trade Contractors". Trade Contractors on all CM projects must be prequalified to bid, regardless

of the estimated construction cost (i.e. not just projects with estimated costs of \$10 million or more). Under the CM at Risk process, the contractor selects the lowest sub-bidder from a list of prequalified sub-bidders and may have the option to negotiate the price if fewer than 3 bids are received.

- Under CM at Risk, the CM firm negotiates a guaranteed maximum price ("GMP") with the awarding authority, which price includes the fee for the CM services, the cost of the work, general conditions and contingency funds for the project. The CM firm may be responsible for costs that exceed the GMP.
- Under the CM at Risk method, there may be an opportunity for bidding early item work packages prior to the completion of the final design, thus accelerating the overall schedule for the project.

8. Will there be educational materials available to educate public officials about the use of CM at Risk and Design Build?

ANSWER: Yes. Training and materials will be available through the Office of the Inspector General's MCPPO program. The Office of the Inspector General anticipates providing a one-day course on each delivery method for procurement officials and others. Please check the Office of the Inspector General's website at <http://www.mass.gov/ig/> for additional information regarding training opportunities.

9. What is the Design Build delivery method available under the new law?

ANSWER: The Design Build delivery method is an alternative method of contracting available for public works and road construction projects in which a single contract is used for both design and construction services. A new statute, M.G.L. c. 149A, was created by Chapter 193 of the Acts of 2004 that provides the option to public agencies to use the Design Build method for public works projects estimated to be \$5 million or more. To use Design Build non-exempt awarding authorities must receive prior approval from the Office of Inspector General and demonstrate that:

- an authorization from the appropriate governing body has occurred;
- the public agency has the capacity and a plan and procedures in place to effectively procure and manage a design-build firm;
- the public agency has procedures to ensure fairness in competition, evaluation, and reporting; and
- the project has an estimated construction value of \$5 million or more.

The Office of the Inspector General is in the process of promulgating regulations and procedures to implement the Design Build process. You should regularly check the IG website at <http://www.mass.gov/ig/> for updated information on the status of the Design Build regulations, procedures, and the implementation schedule. The exempt agencies are the Massachusetts Highway Department, the Massachusetts Port Authority, and the Massachusetts Water Resources Authority.

10. In what instances may our city or town use the new Design Build delivery method?

ANSWER: The Legislature has approved the Design Build delivery method for use by awarding authorities for public works (not building projects) estimated to cost \$5 million or more if the awarding authority has received approval from the Office of the Inspector General. The effective date for the use of the Design Build delivery method is January 1, 2005.

11. How do I receive approval to use Design Build from the Office of the Inspector General?

ANSWER: The new law requires an awarding authority seeking to use design build to submit an application to the Inspector General's Office providing detailed information about the project and the awarding authority's plans and procedures for managing the project. If the awarding authority meets specific requirements, the Inspector General will issue a Notice to Proceed with the design build procurement.

The Office of the Inspector General is in the process of promulgating regulations and procedures to implement the design build process. You should regularly check the IG website at <http://www.mass.gov/ig/> for updated information on the status of the design build regulations, guidelines, and the implementation schedule.